No. 82-1221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEAN S. HARRIS,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CARL A. VERGARI
District Attorney of Westchester County
Office and P.O. Address
County Courthouse
111 Grove Street
White Plains, New York 10601
(914) 682-2161

By: ANTHONY JOSEPH SERVINO
Assistant District Attorney

GERALD D. REILLY
Assistant District Attorney

RICHARD E. WEILL
Assistant District Attorney

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Pursuant to the Revised Rules of this Court, Rule 22, the respondent submits this brief in opposition to the captioned petition for a Writ of Certiorari.

Preliminary Overview

Petitioner was convicted in the County Court, Westchester County, following a jury trial, of the crimes of Murder in the Second Degree, Criminal Possession of a Weapon in the Second Degree, and Criminal Possession of a Weapon in the Third Degree. She was sentenced on March 20, 1981 and May 6, 1981 to serve, respectively, an indeterminate term of imprisonment of not less than fifteen years and not more than life, an indeterminate term of imprisonment of not less than one and one-half years and not more than four and one-half years, and an indeterminate term of imprisonment of not less than one year and not more than three years, all to run concurrently.

On December 30, 1981, this judgment of conviction was affirmed unanimously by order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. *People* v. *Harris*, 84 App. Div. 2d 63. Thereafter, on November 16, 1982, the Court of Appeals of the State of New York affirmed the order of the intermediate appellate court. *People* v. *Harris*, 57 N.Y.2d 335. The instant petition was served upon the respondent on January 20, 1983.

Petitioner concedes that her petition is "out of time," under the provisions of Rule 20.1 of this Court. She requests that her failure to comply with the appropriate time limitations be waived, noting that these requirements are not jurisdictional in nature. *Schacht* v. *United States*, 398 U.S. 58 (1970). Notwithstanding this fact, untimeliness may not be cured absent an "application for extension of time," brought in the manner prescribed by Rules 20.6, 29, 42 and 43. Indeed, this Court has considered such a motion, supported by affidavits, essential to the granting of a petition for certiorari filed *one* day out of time. Cf. *Sanabria* v. *United States*, 437 U.S. 54, 62 n.12 (1978). Moreover, Rule 20.6 states that "[s]uch applications are not favored."

Respondent notes additionally that the Court has not considered "heavy professional commitments" an acceptable reason for extending the time for the filing of a petition for certiorari, even when such a fact is set forth properly in an affidavit in support of an extension motion. *Knickerbocker Printing Corp.* v. *United States*, —— U.S. ——, 99 L. Ed. 1292 (1954); *Carter* v. *United States*, —— U.S. ——, 100 L. Ed. 1508 (1955); *Brody* v. *United States*, —— U.S. ——, 1 L. Ed. 2d 1130 (1957). Unless more compelling reasons for petitioner's admitted untimeliness can be advanced, by motion, the instant petition should be denied as "out of time".

Facts

For six years, from 1974 until 1980, noted cardiologist Herman Tarnower tried tactfully to sever his relationship with Virgina headmistress Jean S. Harris, but petitioner Harris was unwilling to face the realities of her situation. Finally, in telephone conversations between the two on March 6, 1980 and again on the morning of March 10, Tarnower told the petitioner, in no uncertain terms, that he wanted nothing to do with her any longer.

That afternoon, March 10, 1980, the petitioner took her .32 caliber Harrington and Richardson revolver, went out onto the porch of her Virginia home, and test-fired the weapon. Then, at 5:30 P.M., she placed her gun, now fully loaded, into a car along with several extra rounds of ammunition and headed for New York.

After a trip of five hours and having weathered a heavy storm, petitioner arrived at Doctor Tarnower's home in Harrison, New York. It was 10:30 P.M. She entered through the garage, stole silently to the master bedroom, and with revolver in hand confronted the doctor in his bed. Five shots later, Herman Tarnower was dead.

POINT I

No statement of a criminal defendant may be excluded from evidence on constitutional grounds absent police interrogation in any form.

Upon her arrest the petitioner, having been advised repeatedly of her *Miranda* rights and having waived these rights, was asked whether she wished to make a telephone call. In response, she requested permission to call a lawyer friend. The call was placed by police and Mrs. Harris, unsteady on her feet, was assisted to the telephone by an officer. Before he could leave the room, however, and in

the presence of the Tarnower house manager, the petitioner picked up the phone and immediately blurted out a statement, overheard by the patrolman.

In its opinion, the New York Court of Appeals stated the following:

> On the record before us, it is clear that no questioning of Mrs. Harris occurred after she invoked her right to counsel. The statement was neither induced, provoked nor encouraged by the actions of the police officers (see *People* v. *Rivers*, 56 N.Y.2d 476), who had been entirely solicitous of Mrs. Harris' request to speak with a lawyer and had scrupulously honored her rights in this regard (cf. *People* v. *Grimaldi*, 52 N.Y.2d 611). There is nothing in the record to indicate that Officer Tamilio endeavored, by subtle maneuvering or otherwise, to overhear Mrs. Harris' conversation with her attorney. Indeed, the record reflects that this officer, having assisted Mrs. Harris to the telephone, was backing out of the room when he inadvertently overheard the statement. It appears, therefore, that the officer had no opportunity to remove himself from earshot before Mrs. Harris made the damaging statement.

Petitioner's Appendix, pp. A52-A53. Petitioner does not now contest this conclusion, conceding expressly that her statement was overheard inadvertently, without interrogation by police in any form.

The decisions of this Court leave no doubt that a statement uttered by a criminal defendant prior to the commencement of formal judicial proceedings may not be excluded from evidence for violation of either the Fifth or Sixth Amendments unless it was the product of police "interrogation". *Edwards* v. *Arizona*, 451 U.S. 477, 486; *Rhode Island* v. *Innis*, 446 U.S. 291, 300. As defined in *Innis*, interrogation includes "any words or actions on the

part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.*, at 301. This Court further has held that as a normal function of arrest and custody, a police officer has the "right to remain at [an arrestee's] elbow at all times." *Washington* v. *Chrisman*, —— U.S. ——, ——, 70 L. Ed. 2d 778, 784.

There being no challenge, nor any basis to challenge, the absence of such "interrogation" in this case, Constitutional review of the admissability of this statement is unwarranted.

POINT II

A trial court's mere refusal to exclude press and public from petitioner's pre-trial hearings violates no constitutional right.

As this Court twice has held, a criminal defendant has no Constitutional right to a private trial. *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 382 n.11; *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 580. Any claim to the contrary, challenging the *refusal* by a trial judge to close his courtroom to press and public during pre-trial hearings on Constitutional grounds, therefore, is frivolous.

Equally specious is petitioner's assertion that the trial court's refusal to close the courtroom to the press must be *presumed* to have deprived her of a fair trial. This Court has held repeatedly that even pervasive and concentrated pre-trial publicity which exposes jurors to extrajudicial information may not give rise to such a presumption. *Murphy* v. *Florida*, 421 U.S. 794, 799; *Nebraska Press Assoc.* v. *Stuart*, 427 U.S. 539, 565; *Dobbert* v. *Florida*, 432 U.S. 282, 303. Closure of the courtroom, moreover, only prevents the press from reporting events that transpire inside. Such reporting alone never has

amounted to the deprivation of a fair trial. Cf. *Sheppard* v. *Maxwell*, 384 U.S. 333, 362-363.

In addition, respondent would note that at each level of state proceedings in this matter, the courts below determined that petitioner, through defense counsel, was a major contributor to the publicity surrounding her trial. Petitioner's Appendix, pp. A2, A39, A57. Such a fact militates strongly against any further consideration of this issue. *Murphy* v. *Florida*, *supra*, at 796; compare *Nebraska Press Assoc.* v. *Stuart*, *supra*, at 555 n.4.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CARL A. VERGARI
District Attorney of Westchester County
Office and P.O. Address
County Court House
111 Grove Street
White Plains, New York 10601
(914) 682-2161

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